

**Before the  
Federal Communication Commission  
Washington, DC 20554**

**FCC 16M-31**  
10716

In the Matter of	)	MB Docket No. 14-82
	)	
<b>PATRICK SULLIVAN,</b>	)	FRN 0003749041, 0006119796,
(Assignor)	)	0006149843, 0017196064
	)	
and	)	Facility ID No. 146162
	)	
<b>LAKE BROADCASTING, INC.</b>	)	File No. BALFT-20120523ABY
(Assignee)	)	
	)	
Application for Consent to Assignment of	)	
License of FM Translator Station W238CE,	)	
Montgomery, Alabama	)	

**ORDER**

**Issued:** November 22, 2016

**Released:** November 22, 2016

The main issue for decision at the November 17, 2016 Prehearing Conference was the evidentiary use, if any, of the *Abel Assessment* (“Abel Test”) administered to Michael Rice on September 29, 2016. The Abel Test was administered after deposition discovery had been ordered to cease on September 16, 2016.<sup>1</sup>

In a motion to strike, the Enforcement Bureau objected to allowing the Abel Test considered as direct evidence, primarily because it was administered and submitted as evidence by Lake Broadcasting in violation of *Order*, FCC 16M-20, *supra*. The Presiding Judge accepted the Bureau’s rationale, but considered the Abel Test useful as rebuttal evidence if Lake Broadcasting decided to so use it.

In an exercise of judicial discretion, the Presiding Judge initially denied the Bureau’s motion to strike, directing Lake Broadcasting procedurally to seek leave to use the Abel Test in rebuttal, if Lake Broadcasting so intended. The ruling was substantially as follows:<sup>2</sup>

[T]he Motion to Strike is denied without prejudice to refile should Lake fail to request leave to have the report considered as rebuttal evidence with (1) legal and practical argument for considering the

---

<sup>1</sup> See *Order* FCC 16M-20 (rel. June 21, 2016).

<sup>2</sup> *Order* 16M-27, at 2 (rel. Oct. 27, 2016).

late report as rebuttal, and (2) stated reasons for raising rebuttal as a pre-hearing matter. The Bureau will then file an opposition in accordance with Commission rules, including EB's possible need for a second deposition . . . .

But instead, on October 28, Lake Broadcasting filed for leave to use and rely on the Abel Test as direct evidence. In failing to follow the Judge's ruling, Lake Broadcasting has failed to utilize its multiple opportunities to use the Abel Test for any reason, including rebuttal.

At the November 17th Conference, the Presiding Judge heard repeated concerns of Lake Broadcasting's counsel that the record would not be complete without considering the results of the authorized Abel Test.<sup>3</sup> The Presiding Judge hesitantly ruled that under certain conditions at trial, the Abel Test might be allowed to be used in rebuttal, but only if, at the expense of Lake Broadcasting,<sup>4</sup> the Enforcement Bureau had opportunity to depose Dr. Duncan-Hively and/or her husband who had examined Michael Rice for sexual predilections or inclinations before the hearing. The Bureau also would be given leave to have its own expert first review and analyze the raw data from the Abel Test before any deposition of either Duncan-Hively, whichever Dr. Duncan-Hively(s) had administered and/or interpreted the Abel Test.<sup>5</sup>

Finally, Lake Broadcasting must give at least 30 business days' notice to Enforcement Bureau's counsel prior to the date ordered for document/written testimony exchange of Michael Rice's decision to exercise the rebuttal option at trial.

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Richard L. Sippel". The signature is fluid and cursive, with the first name "Richard" and last name "Sippel" clearly distinguishable.

Richard L. Sippel  
Chief Administrative Law Judge

---

<sup>3</sup> The concern appears in pre-conference pleadings and was repeated in open court at the November 17 conference. *See, e.g.,* Lake Broadcasting, Inc.'s Motion for Leave to Submit Results of Post September 25, 2016 Testing of Michael Rice (filed October 28, 2016) at 2-3 (filling testimonial gap).

<sup>4</sup> *See Equant Integrations Servs., Inc. v. United Rentals, Inc.*, 217 F.R.D. 113 (D. Conn. 2003) (late report allowed with penalty of payment of fees and costs).

<sup>5</sup> The Bureau argued at conference that the Abel Test is used only in treatment as a measure of progress, but it does not provide reliable proof of rehabilitation. Counsel for Lake Broadcasting disagreed.